SUPREME COURT, U.S.
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No. 94-135

In the Supreme Court of the United States

OCTOBER TERM, 1994

ITT COMMERCIAL FINANCE CORP., ET AL., PETITIONERS

v.

RICHARD C. GAWORSKI AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether proof of a prima facie case of age discrimination together with evidence showing that an employer's stated reasons for its decision are unworthy of belief is sufficient to support a jury's finding that the employer discriminated on the basis of age.

2. Whether the evidence in this case was sufficient to support the jury's finding that petitioners discriminated on the basis of age.

3. Whether this Court's holding in *Shenker* v. *Baltimore & O. R.R.*, 374 U.S. 1 (1963), that courts of appeals have discretion to determine when to grant rehearing en banc should be overruled.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A36) is reported at 17 F.3d 1104. The district court's opinion (Pet. App. H1-H5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 1994. A petition for rehearing was denied on April 20, 1994. Pet. App. B1. The petition for a writ of certiorari was filed on July 19, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1976, respondent Richard Gaworski began working for an ITT company as a comptroller. Pet. App. A4. In 1984, he became Manager of Credit and Operations for ITT's Capital Resources Group (CRG). *Id.* at A4-A5. Two years later, respondent was terminated. At the time of his termination, respondent was 55 years old, which made him the oldest CRG employee. *Id.* at A3-A4.

Thereafter, respondent filed suit in the United States District Court for the District of Minnesota against petitioners ITT Commercial Finance Corp., ITT Financial Corp., and ITT Corp., alleging that the decision to terminate him was based on his age, in violation of the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.* The Equal Employment Opportunity Commission (also a respondent here) intervened as a plaintiff.

At trial, petitioners sought to show that Gaworski's position was eliminated as part of a reduction in force (RIF). Pet. App. A4. Respondents submitted evidence, however, that Gaworski's position was not eliminated, and that he was instead replaced by a younger, less qualified employee. The day after Gaworski was fired, John Olker, a 46-year-old credit analyst whom Gaworski had been supervising, was promoted to the supposedly "new" position of Manager of Credit and Administration. *Id.* at A5. Olker received an $8,000 raise, took over Gaworski's office, and assumed "substantially all of Gaworski's former duties." *Ibid.* At the time of his last performance review, Gaworski had generally been rated as above average; Olker had been rated as average and it was recommended that he not be promoted during the next year. *Ibid.* Olker had little, if any, experience supervising credit analysts. *Ibid.*

Petitioners offered evidence that they had retained Olker rather than Gaworski because Olker had more experience performing credit analyses and greater knowledge of the computer system. Pet. App. A5. In response, respondents introduced evidence that Gaworski had a "thorough" understanding of credit analysis, while Olker had performed his first "solo" credit analysis only four months before his promotion. *Ibid.* Respondents also introduced evidence that Gaworski had never been informed about a need for computer skills, that computer skills were not listed on Olker's job description, and that Olker's use of the computer had actually declined by more than 50% after his promotion. *Id.* at A5-A6.

Following a trial, the jury returned a verdict for Gaworski, finding that ITT had discriminated against him on the basis of his age. Pet. App. A3. The district court denied ITT's motion for judgment notwithstanding the verdict or a new trial. *Id.* at H1-H5.

2. The court of appeals affirmed. Pet. App. A1-A36. The court noted that this Court's decision in *St. Mary's Honor Center* v. *Hicks,* 113 S. Ct. 2742 (1993), had "clarifie[d] when the question of discrimination is to be left to the finder of fact and when it may be decided as a matter of law." Pet. App. A7. Relying on the statement in *Hicks* that "rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination" (113 S. Ct. at 2749), the court of appeals stated that "if (1) the elements of a prima facie case are present, and (2) there exists sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred, and we are without power to reverse the jury's finding." Pet. App. A8.

Applying that standard, the court first held that the elements of a prima facie case were present. In particular, the court held that Gaworski was within the class of persons protected by the ADEA, that he was performing his work adequately, and that the evidence supported a finding that Gaworski was not terminated as a result of a RIF, but instead "was replaced by a younger employee." Pet. App. A9.

The court then held that "[e]vidence exists to allow reasonable minds to conclude that each of ITT's proffered nondiscriminatory explanations was pretextual." Pet. App. A10. Acknowleding that the ADEA did not permit the jury to review the "propriety" of a business decision, the court found that the "materially conflicting evidence in this case * * * raises a question of fact as to the *believability,* not the propriety, of ITT's purported reasons for discharging Gaworski." *Id.* at A11. The court thus concluded that "the evidence [was] sufficient to allow a reasonable jury to conclude that ITT's proffered nondiscriminatory reasons were 'unworthy of credence,' * * * [and that] ITT acted for reasons other than what it claimed." *Ibid.* Because the elements of a prima facie case were present and the evidence was sufficient to allow a reasonable jury to reject petitioners' explanations for their decision, the court held that "the jury could infer that discrimination occurred." *Id.* at A11-A12.

3. ITT's petition for rehearing and suggestion for rehearing en banc were denied. Pet. App. B1, C1. Five judges voted to grant rehearing en banc; three judges voted to deny it; and two judges did not participate in the decision "because of interest." *Id.* at C1, D1. Under the Eighth Circuit's rules, judges who disqualify themselves are still considered to be in "regular active service" for purposes of deciding whether rehearing en banc should be granted. Accordingly, petitioners' suggestion for rehearing en banc was denied "because a majority of the

judges in regular active service did not vote to grant." *Ibid.*

ARGUMENT

1. Petitioners contend (Pet. 9-15) that the court of appeals applied the wrong legal standard in holding that the evidence in this case was sufficient to support the jury's finding that petitioners discriminated against Gaworski on the basis of age. The result reached by the court of appeals, however, is consistent with this Court's decision in *Hicks*.

a. In *Hicks*, this Court held that a plaintiff's showing that an employer's stated reasons for a decision are unworthy of belief does not compel a finding of discrimination. 113 S. Ct. at 2749. The Court went on to state, however, that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." *Ibid.* For that reason, this Court concluded, "rejection of the defendant's proffered reasons, will *permit* the trier of fact to infer the ultimate fact of intentional discrimination." *Ibid.* "[N]o additional proof of discrimination is *required*." *Ibid.*

The court of appeals followed that reasoning. It held that because "[t]he elements of the plaintiff's prima facie case are * * * present and the evidence is sufficient to allow a reasonable jury to reject the defendant's non-discriminatory explanations[,] * * * the jury could infer that discrimination had occurred." Pet. App. A11-A12. That holding properly implemented the rule set forth in *Hicks*.

Petitioners contend that the court's decision is erroneous because it holds that if an employee establishes a prima facie case and proves that the reasons the employer has given for the decision are unworthy of belief, an employer can never obtain judgment as a matter of law. Pet.

12. If the court's opinion were read in that way, it would be an incorrect statement of the proper rule, since in some unusual cases, the evidence may compel a finding that neither the employer's proffered explanation nor discrimination was the real reason for a decision. To take an example given by the First Circuit, if an employer asserted that he fired the plaintiff because he was unqualified, but the evidence unequivocally showed that the plaintiff was really fired because the employer wanted to conceal his own act of embezzlement, a jury could not reasonably infer that the employer discriminated on the basis of age. See *Woods* v. *Friction Materials, Inc.*, No. 93-2296 (July 29, 1994), slip op. 11-12 n.3.

When read out of context, language in the court's opinion might suggest that a defendant could not obtain judgment as a matter of law even in such a case. Pet. App. A8. Because the court of appeals was not presented with that situation, however, the opinion should not be read to address it. Instead, we read the court's opinion to address the far more common situation presented in this case—one where the evidence does not conclusively show that neither the employer's stated reasons nor discriminatory intent motivated the decision. In that context, the court's holding that, if the evidence is sufficient to permit the jury to infer that the employer's proffered reasons were not the real reasons for the action, it is also sufficient to permit the jury to find discrimination, is correct. Under *Hicks*, "[n]o additional proof of discrimination is *required*." 113 S. Ct. at 2749.*

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* As petitioners acknowledge, the court of appeals' decision is consistent with the decisions in *Mitchell* v. *Data Gen. Corp.*, 12 F.3d 1310, 1316 (4th Cir. 1993), *Anderson* v. *Baxter Healthcare Corp.*, 13 F.3d 1120, 1124 (7th Cir. 1994), and *Washington* v. *Garrett*, 10 F.3d 1421, 1433 (9th Cir. 1993). Other circuits have similarly concluded that a showing of a prima facie case together with a showing of

b. Petitioners contend (Pet. 13) that the court of appeals' decision conflicts with the decisions in *LeBlanc* v. *Great American Ins. Co.*, 6 F.3d 836, 843 (1st Cir. 1993), cert. denied, 114 S. Ct. 1398 (1994), and *Bodenheimer* v. *PPG Industries, Inc.*, 5 F.3d 955, 957-958 (5th Cir. 1993). There is, however, no such conflict.

In *LeBlanc,* the First Circuit concluded that "*Hicks* requires that, once the employer has advanced a legitimate, nondiscriminatory basis for its adverse employment decision, the plaintiff, before becoming entitled to bring the case before the trier of fact, must show evidence sufficient for the factfinder reasonably to conclude that the employer's decision to discharge him or her was wrongfully based on age." 6 F.3d at 843. The court of appeals' decision here does not conflict with that statement of the governing legal standard. Instead, consistent with *Hicks,* the court simply concluded that proof that the employer's explanation is unworthy of belief can permit the jury to infer that the employer acted on the basis of age. The First Circuit in *LeBlanc* did not suggest otherwise. Rather, it held that, because the employee in that case failed to produce sufficient evidence of pretext, the employer was entitled to judgment as a matter of law. 6 F.3d at 845-847, 849.

In *Bodenheimer,* the Fifth Circuit stated that, to avoid judgment as a matter of law, a plaintiff is required to "produce sufficient evidence to establish that [the employer's] reasons were pretexts *for age discrimination.*" 5 F.3d at 958. The court then held that the plaintiff in that case

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pretext is sufficient to support a jury's finding of discrimination. *E.g., Cabrera* v. *Jakabovitz,* 24 F.3d 372, 382 & n.9 (2d Cir. 1994), petition for cert. pending, No. 94-216; *Fuentes* v. *Perskie,* No. 93-5561 (3d Cir. Aug. 1, 1994), slip op. 6-7; *Durham* v. *Xerox Corp.*, 18 F.3d 836, 839-840 (10th Cir. 1994); *Batey* v. *Stone,* 24 F.3d 1330, 1334 (11th Cir. 1994).

had failed to introduce sufficient evidence to show that the employer's reasons were pretextual. *Id.* at 958-959. Because the court concluded that the employee had failed to introduce sufficient evidence of pretext, it had no occasion to decide whether such a showing would have been sufficient to permit an inference that the employer acted on the basis of age—the issue decided by the court of appeals here. Although the Fifth Circuit questioned in a footnote whether such proof would have been sufficient in light of *Hicks,* that discussion was both tentative and unnecessary to the court's decision. *Id.* at 958 n.8.

2. Petitioners contend that the evidence in this case was insufficient to support the jury's finding that they discriminated against Gaworski on the basis of age. Pet. 15-18. That fact-bound contention affects only the parties to this case and therefore does not warrant this Court's review. *Rudolph* v. *United States,* 370 U.S. 269, 270 (1962).

In any event, petitioners' sufficiency of the evidence argument is without merit. As the court of appeals noted, while petitioners asserted that Gaworski was fired as a result of a RIF, respondents introduced evidence that Gaworski, who was the oldest employee in his division, was, in fact, replaced by a younger and less qualified employee. In particular, respondents introduced evidence that the day after Gaworski was fired and his position was supposedly eliminated, petitioners promoted Olker to a position with almost the same title. Olker also received a substantial raise, took over Gaworski's office, and assumed almost all of his duties. Respondents also introduced evidence that Gaworski had been given a better performance review than Olker, and that Olker had little, if any, experience supervising analysts. Pet. App. A5.

In response to that showing, petitioners introduced evidence that they retained Olker rather than Gaworski

because of his experience performing credit analyses and his computer expertise. Pet. App. A5. However, as the court of appeals noted, respondents introduced evidence that Gaworski had a thorough understanding of credit analysis, while Olker had only recently begun to perform his own analyses. *Ibid.* Respondents also introduced evidence that Gaworski had never been told about any need for computer skills, that computer skills were not listed on Olker's job description, and that Olker made far less use of his computer skills once he assumed his new position. *Id.* at A5-A6. As the court of appeals concluded, that evidence was sufficient to permit the jury to infer that the reasons given by petitioners for firing Gaworski were not believable and that Gaworski was really fired because of his age. *Id.* at A10-A12.

3. Finally, petitioners contend (Pet. 22-24) that the court of appeals erred in failing to grant rehearing en banc. Of the ten active judges in the Eighth Circuit, five voted in favor of rehearing en banc, three voted against it, and two did not participate in the decision. Pet. App. C1. Because the Eighth Circuit will rehear a case en banc only when an absolute majority of all active circuit judges vote in favor of rehearing, petitioners' suggestion for rehearing en banc was denied.

Petitioners contend (Pet. 23-24) that since a majority of those voting on the rehearing petition voted in favor of it, the suggestion for rehearing en banc should have been granted. According to petitioners, the Eighth Circuit's absolute majority rule is inconsistent with 28 U.S.C. 46, which authorizes rehearing when "a majority of the circuit judges of the circuit who are in regular active service" vote for it.

Petitioners' argument is foreclosed by this Court's decision in *Shenker* v. *Baltimore & O. R.R.*, 374 U.S. 1 (1963). *Shenker* arose in the Third Circuit, which at that

time had eight judges in active service. Of those eight, four voted to grant rehearing en banc, two voted to deny, and two did not vote. The Third Circuit denied rehearing in accordance with its rule providing that rehearing en banc would be granted only when an absolute majority of the active members in the Circuit voted in favor of it. This Court held that the Third Circuit's rule was consistent with 28 U.S.C. 46. 374 U.S. at 4-5. The Court reasoned that Section 46 gives courts of appeals "discretion" to determine the means by which a majority may order rehearing en banc. *Ibid.* To hold otherwise, the Court added, "would involve it unnecessarily in the internal administration of the Courts of Appeals." *Id.* at 5.

Petitioners argue that *Shenker* has led to inconsistent rules in the circuits, with some following the Eighth Circuit's approach and others requiring a majority of those voting. Pet. 22-23. For that reason, petitioners contend, *Shenker* should be overruled. Pet. 23-24. The lack of uniformity about which petitioners complain, however, has existed for decades. Moreover, that lack of uniformity is precisely what this Court's decision in *Shenker* contemplated when it held that the subject was one over which each court of appeals could exercise discretion. The lack of uniformity identified by petitioners therefore provides no basis for overruling *Shenker.*

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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